UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ARTEMIS COFFIN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil No. 03-227-B-C
BOWATER, INC., et al.,	)	
	)	
Defendnats.	)	

MEMORANDUM OF DECISION ON PLAINTIFFS' MOTION TO ENFORCE PROTECTIVE ORDER

On May 19, 2005, I held a telephone conference to address a discovery dispute concerning an allegedly privileged document that plaintiffs disclosed to the defendants during discovery. As outlined in my Report of Telephone Conference of that date (Docket No. 99), I instructed counsel to brief the dispute because the parties had previously submitted a "Stipulated Consent Confidentiality Order" that modified this District's form protective order in certain respects. Contrary to local rule, the modification was not brought to my attention and I endorsed the motion, inadvertently failing to catch the modification to the District's form. Nevertheless, by the time this dispute was brought to my attention, plaintiffs had more than once returned to defendants, based on the confidentiality order, documents that the defendants contended were privileged and were inadvertently disclosed during discovery. The parties having stipulated to the protective order, the court having endorsed the order and the plaintiffs having already complied with the order, I concluded that, in fairness, the protective order should be enforced as written. Consequently, the court now has before it a full-fledged privilege contest in which the parties dispute virtually every aspect of the standards that apply to the attorney-client privilege,

which dispute would not otherwise have arisen in one of Judge Carter's cases. See F.D.I.C. v. Singh, 140 F.R.D. 252, 253 (D. Me. 1992) (Carter, J.) (holding that inadvertent disclosure necessarily deprives documents of their confidential status and, therefore, destroys any legal privilege). At the conclusion of the May telephone conference, I granted the plaintiffs leave to file a motion addressing the issues of (1) whether the document at issue is, in fact, a privileged one and (2) if it is privileged, how it should be treated under the terms of the confidentiality order. That motion is now fully briefed (Docket Nos. 103, 105 & 110). After a review of the parties' legal memoranda and supporting affidavits and *in camera* review of the document in question, I conclude that the document need not be returned to the plaintiffs because the communications it contains where not made in the course of this litigation and were not meant to advance the plaintiffs' interest in this litigation.

Background Facts

The relevant provision of the confidentiality order provides as follows:

> **15. Return of Inadvertently Produced Privileged Documents.** Any inadvertent disclosure or production of documents protected by the attorney-client or work-product privileges shall not constitute a waiver of any privilege by the disclosing party. In the event that the receiving party discovers the disclosure or production it shall bring the matter to the attention of the producing party and return the document upon request. In the event that the discovery is made by the producing party, it may request the receiving party to return the document, which request shall be promptly honored. In either such instance the receiving party shall not photocopy the document and shall destroy any copies made prior to the discovery of the disclosure.

(Stip. Consent Confidentiality Order, Docket No. 76, ¶ 15.) By its terms, the order applies to "all documents produced in the course of discovery, including initial disclosures, all responses to discovery requests, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom." (Id. ¶ 1.)

The document that is the subject of the present dispute is a draft document entitled "Fact Sheet Re Bowater Sale of Great Northern Paper to Inexcon and Proposal From Management for Union Concessions." It has been filed under seal and in paper form as Exhibit C to the plaintiffs' motion. The document was created by James W. Case, a partner in the law firm of McTeague, Higbee, Case, Cohen, Whitney & Toker. It was created on behalf of Maine local chapters of the International Association of Machinists and Aerospace Workers (IAMAW). According to Mr. Case, these local unions and others hired Case and his firm to provide legal counsel, assist in potential collective bargaining negotiations and conduct fact investigations. (Case Decl., Docket No. 103, Elec. Attach. 3, ¶ 5.) In the course of that representation, Case drafted the subject document on or around July 14, 1999, to address "questions and concerns raised by various client representatives in confidence to my firm." (Id. ¶ 7.) According to Case, "The document was intended to address those confidentially posed questions and concerns, and a review of that document reveals what those questions and concerns were." (Id.)

The document consists of 10 type-written pages. The first three pages relate a factual history of Bowater's efforts to sell off Great Northern Paper Company (GNP), including its agreement to sell the company to Inexcon in a stock sale, Inexcon's statements concerning its plans for the company, and overtures by Inexcon to obtain concessions from the unions in relation to Inexcon's alleged intentions to make GNP a leader in the specialty paper market. Also included in these pages is a summation of Inexcon's proposal to the unions. On pages 4-6 Case relates that 'information requests' were sent to Bowater, describes financial information found in public filings concerning Bowater's pension plan liabilities and assets and provides a brief explanation of the status of union members' retirement benefits and Bowater's legal obligations regarding the same. Page 6 of the document contains a representation under the heading

"Medical Benefits for Retirees" of which Bowater raises considerable fanfare. Pages 6-8 otherwise describe what transpired at a July 9, 1999, meeting between union officials and certain officers of Bowater, GNP and Inexcon. The balance of the document contains two pages of comments and advice concerning "Where We Go From Here" in regard to possible collective bargaining.

There is no indication on the face of the document who the author was or who it was addressed or delivered to. According to Case, he was the author and David Lowell, an IAMAW local union representative, the sole recipient. Case relates that he delivered the document exclusively to Mr. Lowell, understanding that Lowell would not disclose the document to anyone "outside the circle of persons sharing the same counsel." (Id. ¶¶ 9.) David Lowell has also submitted a declaration in support of the plaintiffs' motion. According to Lowell, he was a business representative of District 99 of the IAMAW and his primary job function was to represent the local unions in relation to the investigation of grievances and the negotiation of collective bargaining agreements. (Lowell Decl., Docket No. 103, Elec. Attach. 4, ¶ 2.) In this capacity Lowell served as the locals' representative at meetings and negotiations related to Bowater's proposed sale of GNP to Inexcon and participated in the decision by the IAMAW and other "Trades" to hire counsel in connection with the same. (Id. ¶ 3.) According to Lowell, the Trades sought legal counsel out of concern "whether we had a duty to meet with and/or negotiate with Bowater and Inexcon, . . . whether and to what extent such midterm negotiations could adversely affect benefits that had been previously negotiated, and . . . whether and to what extent management had a duty to provide us with financial and other information concerning the proposed sale transaction. (Id.) Lowell relates that he received the subject document in his capacity as a representative of Mr. Case's union clients (the "Trades") and that he does not

believe that he provided the document to anyone at all and is certain that he did not provide the document to anyone outside the "Trades representative client group." (Id. ¶ 5.) Finally, Lowell relates that he provided the subject document to plaintiffs' counsel after learning that counsel had been hired to file suit on behalf of the plaintiffs and also after deciding on behalf of the Trades to enter into an agreement with plaintiffs' counsel to hire them and signing a retainer agreement with said counsel. According to Lowell, "While I knew that Bredhoff & Kaiser was also representing individuals in connection with this lawsuit who had never been represented by the Trades unions, including former salaried employees, I concluded that all of Bredhoff & Kaiser's clients had common interests in connection with the proposed litigation." (Id. ¶ 6.)

Discussion

This memorandum focuses narrowly, and exclusively, on the question of whether the subject document is a privileged document subject to return under the stipulated consent confidentiality order. Not addressed is the question of whether the document is admissible in this litigation.

Because the court's jurisdiction is based on the presence of federal questions, federal common law provides the rule of decision. Fed. R. Evid. 501. "For the attorney-client privilege to attach to a communication, it must have been made in confidence and for the purpose of securing or conveying legal advice. The privilege evaporates the moment that confidentiality ceases to exist." XYZ Corp. v. United States (In re Keeper of the Records), 348 F.3d 16, 23 (1st Cir. 2003). The attorney-client privilege belongs to the client, Kevlik v. Goldstein, 724 F.2d 844, 850 (1st Cir. 1984), and will be recognized as protecting from disclosure a document containing attorney-client communications when the proponent of the privilege demonstrates that (1) he was or sought to be a client of the attorney; (2) the communication contained on the

document was made when the attorney was acting as a lawyer; (3) the communication was made for the purpose of securing legal services; and (4) the privilege has not been waived. Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1457 (1st Cir. 1992).

Bowater argues that the plaintiffs cannot assert that the document is privileged because the document was created for the Trades and, therefore, the plaintiffs cannot demonstrate that they were "the client" in connection with the document at issue. (Defs.' Opp'n to Pls.' Mot. to Enforce the Protective Order, Docket No. 105, at 1.) According to Bowater, because the plaintiffs were not the clients for whom the document was created, they lack "standing" to assert the privilege. (Id.) In reply, the plaintiffs argue that because (1) they share a common interest with the Trades in relation to this litigation with Bowater, (2) the Trades also retained plaintiffs' counsel prior to the disclosure of the document[1] and (3) the Trades desire to defend their privilege, the plaintiffs have standing to assert the Trades' privilege in this litigation. (Pls.'s Reply, Docket No. 110, at 2.) I conclude that Bowater's contention concerning standing would likely be correct, but for the existence of the confidentiality order. The provisions set forth in paragraphs 1 and 15 of that order are sufficiently broad, in my view, to make it appropriate for a party to request the return of a third party's privileged document, provided the document is, in fact, privileged. The order flatly protects "all documents produced" (¶ 1) as well as "[a]ny inadvertent disclosure" (¶ 15). Although it might be tempting to think of a privilege owned by the Trades as being outside the bounds of the confidentiality order because the Trades are not parties to the litigation or the stipulation, the language agreed upon by the parties is exceedingly broad and does nothing to limit its reach to only those privileges held by the parties themselves. When parties mutually agree that the disclosure of privileged information will not result in a

[1] There is no indication in the record why the Trades decided to retain counsel in connection with this litigation, let alone the same counsel as the plaintiffs.

waiver of confidentiality, it appears that, generally, they will be bound by their agreement. XYZ Corp., 348 F.3d at 28 (enforcing non-waiver agreement based on course of conduct and in the absence of a written agreement). For that reason, I conclude that the plaintiffs do have "standing" to demand the return of a third-party's privileged document pursuant to the agreement.

Bowater raises several challenges on the question of whether the document is privileged. In particular, Bowater argues that the Trades' sharing of the document with the plaintiffs served to waive any privilege the Trades may have once had in the document. (Defs.' Opp'n at 6.) In their reply memorandum the plaintiffs contend that this disclosure of the document to them or their counsel could not have waived the Trades' privilege because the plaintiffs and the Trades have a common interest in the lawsuit and, therefore, the sharing of privileged communications is excepted from the general rule of waiver-by-disclosure. (Pls.' Reply at 5.)

The common-interest doctrine is "an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002) (quoting E.S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 196 (4th ed. 2001)). The doctrine applies "when two or more clients consult or retain an attorney on particular matters of common interest." Id. at 249 (quoting 3 Weinstein's Federal Evidence § 503.21[1] (J.M. McLaughlin, ed., 2d ed. 2002)). "In such a situation, 'the communications between each of them and the attorney are privileged against third parties' [as are] 'communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest.'" Id. at 249-50 (quoting 3 Weinstein, *supra*, § 503.21[1] & [2]).

I conclude that the common interest doctrine does not preserve the Trades' privilege in the document at issue because the communications contained in that document were not made in

order to advance the alleged common interest in this lawsuit. The common interest doctrine applies only where the communication is made in the course of the common enterprise and in order to advance the common interest. United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Lugosch v. Congel, 219 F.R.D. 220, 237 (N.D. N.Y. 2003); Ferko v. NASCAR, 219 F.R.D. 396, 401 (E.D. Tex. 2003); Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 93 (D. Mass. 2002).

The document in question was created in 1999, roughly four years prior to the commencement of this litigation, and the communications related therein cannot reasonably be construed as having been designed to advance the plaintiffs'—let alone a common—interest in this litigation. To the contrary, the document was intended to advise the Trades with regard to prospective collective bargaining in relation to Inexcon's purchase of GNP. According to both Mr. Case and Mr. Lowell, it was understood by both men that the document was confidential and should not be disclosed to members of the Trades. Moreover, although there are apt to be some similarities among the interests at stake during collective bargaining activities in 1999 and the instant litigation, those interests are not identical. FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("The term 'common interest' typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest."). The fact that the communications were made in 1999 order to advance diverse collective bargaining interests reinforces the conclusion that they were not made for the purpose of advancing the plaintiffs' interest in this litigation.[2] Because the communications contained in the document were not made in the course of this litigation or for purposes of this litigation, the common interest doctrine does not apply and

[2] Bowater would no doubt argue that the communications could not have been intended to advance the plaintiffs' interest in this lawsuit because, according to Bowater, the document contains a statement that is at odds with the plaintiffs' core contention in this lawsuit. (Defs.' Response at 1.) Of course, the plaintiffs contend that the statement is not at odds with their litigation objective. (Pls.' Reply at 1 n.1.)

disclosure of the document to the plaintiffs waived any privilege that the Trades might have had in the document, if indeed the document was subject to the attorney client privilege at its inception.

Conclusion

For the reasons set forth above, the plaintiffs' Motion to Enforce the Protective Order (Docket No. 103) is **DENIED**.

CERTIFICATE

This Order shall be filed forthwith. Any objections to this order shall be filed in accordance with Fed. R. Civ. P. 72.

So Ordered.

Dated June 14, 2005

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

COFFIN et al v. BOWATER INCORPORATED et al
Assigned to: JUDGE GENE CARTER
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

Date Filed: 12/31/2003
Jury Demand: Plaintiff
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

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ATTORNEY TO BE NOTICED

RICHARD G. MOON
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ROBERT P. DAVIS
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

BOWATER INCORPORATED POINT OF SERVICE MEDICAL BENEFITS PLAN

represented by **REGINALD R. GOEKE**
(See above for address)
ATTORNEY TO BE NOTICED

RICHARD J. FAVRETTO
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ATTORNEY TO BE NOTICED

ROBERT P. DAVIS
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ERIC J. UHL
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RICHARD G. MOON
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ATTORNEY TO BE NOTICED

Defendant

BOWATER INCORPORATED POINT OF SERVICE MEDICAL PLAN

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Defendant

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